

No. 81633-6

MADSEN, C.J. (dissenting)—Although I have concerns about the majority’s comparison of a measuring wheel to radar devices, my greater concern is with the majority’s treatment of the jury instructions and its conclusion that instructional error regarding jury unanimity was not harmless.

First, with regard to the majority’s conclusion that a measuring wheel is analogous to radar devices and thus similar authentication requirements apply before evidence of the wheels’ measurements may be admitted, the analogy is inapposite. Radar measuring devices are complex machines whose operation is not within the common understanding of jurors. Further, where complicated radar devices used to measure speed and breath testing equipment used to measure blood or breath alcohol levels are concerned, state statutes and regulations set forth the standards and requirements for admission of test results. RCW 46.61.506; CrRLJ 6.13(c), (d); IRLJ 6.6; Title 448 WAC. In contrast, there is no protocol for calibrating a measuring wheel and no rule or statute dictating testing prior to use.

This is logical, since, unlike a radar device or breath testing equipment, a measuring wheel does not rely for its result on complex scientific theory or complicated mechanical operation; a measuring wheel is no more than a round ruler. Its operation is within the common understanding of jurors. The accuracy of the device's result is a question of weight to be given the evidence and not admissibility. I disagree with the majority's conclusion that a measuring wheel is subject to the same authentication requirements as radar devices.

My greater concern, however, is that the majority concludes that error in instructing the jury on the unanimity requirements for special findings on whether Bertha Bashaw distributed a controlled substance within 1,000 feet of a school bus route stop was not harmless error. I disagree.

This case is unlike *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003), upon which the majority bases this conclusion. In *Goldberg*, an aggravated murder prosecution, the jury initially returned a verdict and answered "no" on the special verdict form for the aggravating factor that the State alleged. *Id.* at 891, 894. The jury was polled. One juror raised a hand to confirm a "no" vote, although evidently three jurors actually voted "no." As the court explained in *Goldberg*, the judge then proceeded as if the jury was deadlocked and instructed the jury to continue deliberating to see if unanimity could be reached. *Id.*

At the time the jury returned its original verdict, it was close to 5:00 p.m. and the jury had been deliberating since 11:00 a.m. that day. *Id.* at 891. The jury was instructed

to resume deliberations the next day. *Id.* The next day, after deliberating three more hours, the jury returned a unanimous finding that the State had proved the aggravating factor. *Id.* at 891-92.

This court concluded in *Goldberg* that unanimity is not required for a special verdict and there was no error in the jury's original verdict. *Id.* at 894. The court further held that it was error for the trial court to order continued deliberations. *Id.*

In the present case, however, the jury returned one verdict and there is nothing to indicate there was any error in the jury's original and only verdict. Unlike in *Goldberg*, the jury was not advised, after returning a verdict, that it must continue to deliberate. Unlike in *Goldberg*, the polling of the jury showed no disagreement on the question whether the state had proved that delivery of controlled substances occurred within 1,000 feet of a school bus route stop.

Moreover, the jury here was advised as to what it must find to return a finding that delivery took place within 1,000 feet of a school bus route stop. Jury instruction 19 instructed the jury, as to each count of delivery of a controlled substance, that if it found the defendant guilty, it would then complete a special verdict form. This instruction also correctly told the jury with respect to each count:

If you find from the evidence that the state has proved beyond a reasonable doubt that the defendant delivered the controlled substance to a person within one thousand feet of a school bus stop route stop designated by a school district, it will be your duty to answer the special verdict form [A] [B] [C] "yes."

Clerk's Papers at 95-96 (Jury Instruction 19). A jury is presumed to follow the jury

instructions. *State v. Gamble*, 168 Wn.2d 161, 178, 225 P.3d 973 (2010); *State v. Kirkman*, 159 Wn.2d 918, 937, 155 P.3d 125 (2007). Nothing indicates that the jury did not do so.

The majority suggests that a different outcome might have resulted under proper instructions. The majority is therefore either suggesting that the jury might not have followed the jury instructions when it returned its unanimous findings—which would be antithetical to the presumption that juries follow the instructions they are given, or the majority is suggesting that the jury was coerced or influenced by the unanimity instruction into reaching a conclusion it would not otherwise have reached—which is equally unacceptable given that unanimity is required for guilty verdicts. We certainly do not infer from a unanimous verdict on guilt that the jury was coerced or improperly influenced by an instruction on unanimity. Why does the majority doubt the unanimous verdict here?

*Goldberg* is not the same as this case, contrary to the majority's belief. Because unanimity is not required, the original verdict form in *Goldberg* stated the jury's true, legally permissible finding. The judge rejected this true initial verdict on impermissible grounds and instead accepted a legally erroneous verdict, which was erroneous because it was arrived at only after the judge informed the jury that its initial verdict was not acceptable. We know all of this because we know what the original verdict form said; we know that the results of the jury polling confirmed the original verdict; we know what then occurred, including the judge's instruction ordering the jury to return the next day

and continue deliberation with the goal to achieve unanimity; and we know that the second verdict was unanimous and contrary to the first verdict.

None of these circumstances exist in the present case. All that exists is the majority's speculation that a proper instruction might have resulted in a different verdict. That speculation does not accord with the jury instructions given and the presumption that the jury would not have returned its unanimous verdict unless each of the jurors was persuaded that the State proved that the offenses occurred within 1,000 feet of a school bus route stop, as instructed.

For the reasons stated, I dissent. As I have noted, I am most concerned about the majority's ill-considered conclusion that the instructional error was not harmless error.

AUTHOR:

Chief Justice Barbara A. Madsen

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WE CONCUR:

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Justice Gerry L. Alexander

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Justice James M. Johnson

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